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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EDWARD NATHANIEL TABB, Defendant and Appellant.	E034733 (Super.Ct.No. RIF110803) OPINION

APPEAL from the Superior Court of Riverside County. J. Michael Beecher, Judge. (Retired judge of the Orange Superior Court, assigned by the Chief Justice pursuant to art. VI, § of the Cal. Const.) Affirmed.

Maureen J. Shanahan, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Garrett Beaumont, Senior Deputy Attorney General, and Gil P. Gonzalez, Supervising Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Edward Nathaniel Tabb of receiving stolen property (Pen. Code, § 496, subd. (a)), and displaying the wrong license plate (Veh. Code, § 4462.5).[1] In bifurcated proceedings, he admitted having suffered two prior convictions for which he served prison terms. (Pen. Code, § 667.5, subd. (b).) He was sentenced to prison for four years, and appeals, claiming the trial court erred in denying his motions challenging the prosecutor's peremptory challenge of certain prospective jurors and for mistrial and a new trial, jury misinstruction occurred, and the evidence was insufficient to sustain the verdicts. We reject his contentions and affirm.

FACTS

In November 2002, the owner of a 1982 Ford Thunderbird donated her car to the Salvation Army. At the time, the car had front and rear license plates with the designation "1FIB131"; however, the annual registration tag had expired the previous August. In January 2003, Tabb and his wife purchased the Thunderbird from the Salvation Army. All the documents related to the sale, which Tabb signed, bore "1FIB131" as the designation appearing on the plates for the car. Tabb, alone, signed a statement that he was taking the car to another state for registration, which did not require him to provide a current smog certification or registration fees. He orally represented that he would be taking the car to Arizona. It was the policy of the Salvation Army to remove the plates from such a car and destroy them, leaving it to the new owner to obtain

[1] The jury also convicted him of petty theft with a theft prior (Pen. Code, § 666); however, the trial court vacated the conviction and dismissed the charge pursuant to Penal Code section 1385.

permission from the Department of Motor Vehicles to take the car out of state. However, a representative of the Salvation Army was uncertain if this had been done to the Thunderbird. In fact, it had not, as, on May 10, 2003, Tabb received a citation for an expired annual registration tag, which noted that the 1FIB131 plates were still on the car.[2] On June 2, 2003, the owner of a Chrysler reported that the rear license plate of his car, bearing the designation "4XZP648," had just been stolen. The tag of that plate was due to expire in September 2003. On June 20, 2003, Tabb, driving the Thunderbird with his wife as a passenger, was pulled over by a police officer. The rear license plate on the Thunderbird was the one that had been stolen from the Chrysler. Tabb told the officer that the plate that was then on the back of the Thunderbird was the same one that had been on it when he purchased it from the Salvation Army, although he claimed he had not checked it at the time of purchase. Tabb's wife reiterated his story. She did not say that she had put the rear plate on the Thunderbird or that she had purchased this plate from anyone.

Tabb called one witness, a defense investigator who testified that at a time unspecified after the crimes, Tabb's wife delayed responding to the former's attempts to contact her by phone and, once in touch, failed to disclose her whereabouts to her. The defense argued to the jury that it was just as likely that Tabb's wife had put the stolen rear

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[2] The citation also stated that the car's registered owner was the person who had donated it to the Salvation Army the previous November. When Tabb had purchased the Thunderbird in January 2003, he signed a statement that he would have the title transferred to his name within 10 days of the 20th of that month.

license plate on the Thunderbird as it was that Tabb had done so. The wife had not been arrested for the crimes.

ISSUES AND DISCUSSION

1. *Peremptory Excusal of Prospective jurors Described by the Defense as Hispanic*

The prosecutor peremptorily excused two prospective jurors, a male with a Hispanic surname and a female, which the defense later described as being Hispanic. At the same time, the defense used a peremptory against another prospective juror. After the replacements for these three had been briefly questioned, the prosecutor peremptorily excused a female prospective juror with a Hispanic surname. The defense then made a *Wheeler*/*Batson*[3] motion. The trial court invited counsel to a sidebar "initially," and a discussion was held which was not transcribed. Back on the record, proceedings resumed, making it appear as though no motion had been made. A short time later, the jury was sworn in and alternates were chosen. Outside the presence of the jury, the trial court said, "To avoid overtime problems, we'll have to go over to Monday morning." Defense counsel said, "On Monday morning we can bring up the other things I want to put on the record." The trial court agreed.

After discussing a number of issues on the following Monday, defense counsel said, "The . . . issue we addressed at sidebar was that I had made a *Batson-Wheeler* objection to the peremptory challenges that [the prosecutor] was making, based . . . on the

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[3] *People* v. *Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*); *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*).

fact that they were all Hispanic. I wanted to put that on the record. I believe based on the fact that we kept going that the Court denied that challenge, but I wanted to put that on the record." The trial court responded, "It was denied. [The prosecutor] had an explanation for the last person he excused [(which was the female Hispanic)]. You know that sounded reasonable. There were a large number of Hispanics in the jury pool, as we noted, although that doesn't make it impossible to make this motion. Mr. Tabb does not happen to be a Latino as far as we know. So it's not perhaps as close to home as it might be in some cases." The trial court invited comment from the prosecutor. The latter said, "Personally I'm offended by being a minority. And having counsel to accuse me of *Batson-Wheeler* I think is outrageous. . . . Secondly, she has no basis for bringing this. I don't know if [the person defense counsel described as a Hispanic] is Hispanic. I don't know what her nationality is. The other two preempts that I used, they happened to be Hispanic, and I think I told the Court the reasons why I kicked them." The trial court responded, "[W]e have two [other] people with Latino names on our jury . . . . I didn't get any impression that there was any attempt at ethnic cleansing going on. So I think the prior ruling was correct."

In Tabb's motion for a new trial, following his conviction, defense counsel asserted that the prospective juror whose nationality was not known "appeared [to her] to be Latino-American, and [the latter] had a slight accent. It was later determined that . . . she is indeed Latina, . . . but this information was not available at the time of jury selection. After the prosecutor challenged [her], defense *asked to approach* to make a

Batson-Wheeler motion.[4] The court at sidebar (without the court reporter) indicated that he understood why the prosecutor would [excuse her and the male Hispanic prospective juror], but that he was puzzled as to [the female Hispanic prospective juror]. The prosecutor replied that 'she looked like she wasn't really paying attention.'" (Italics added.) The prosecutor did not submit a written opposition to Tabb's motion for a new trial.

At the hearing on the motion, the trial court said, "[N]one of the three of us [(meaning it and counsel)] were aware that [the prospective juror whose nationality was unknown] was possibly a [L]atina at the time of selection -- at least I didn't know. [¶] Is that the situation?" The prosecutor replied, "It is for me, Your Honor." The trial court went on, "[L]et's assume that [she is Hispanic], but, nonetheless, it is a fact unknown to anyone during jury selection, so I don't think the fact that further investigation showed that she -- despite her name and I think appearance was actually of Latin origin, I can't see it as relevant unless somebody would have known about it at the time of selection. [¶] . . . [A]s far as we know, Mr. Tabb is not of Latin origin and I believe that we did have some people of Latin origin left on the jury after selection . . . . [¶] . . . I had expected [the prosecutor] to [excuse] two people who happened to be of Latin origin on non-ethnic grounds, which is why I said at the time that I understood the first two

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[4] This is inaccurate. It was not until the prosecutor excused the female Hispanic *prospective juror* that defense counsel brought her *Wheeler*/*Batson* motion.

[excusals],[5] but I didn't know about the third. [¶] And then [the prosecutor] mentioned his thinking for the third person there." The trial court asked defense counsel if she had anything to add and she submitted the matter without further comment.

Tabb here contends that the trial court erred in failing to hold a hearing on defense counsel's *Wheeler*/*Batson* motion. However, based on the above recited portions of the record, it appears that a hearing was, indeed, conducted, during which the prosecutor offered explanations for his excusal of the two jurors in question that appeared to him, the trial court and defense counsel to be Hispanic. The problems lies in the fact that that hearing was not transcribed. Tabb does not cite a single case holding that the failure to have such a hearing transcribed requires reversal. Absent this, we are not inclined to do so.

Tabb also contends that the trial court failed to make an adequate inquiry to determine the merits of his motion. Again, the record belies this. Apparently, such an inquiry was conducted,[6] although off the record, and the trial court was satisfied that the

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[5] Actually, the first two excusals were of the person of unknown nationality and the Hispanic male. The third was of the Hispanic female, as the trial court correctly noted.

[6] Tabb here asserts, "[I]t appears the [trial] court simply asked the prosecutor why he excused the last of the three," which would be the female Hispanic. However, as stated above, at the Monday hearing, the prosecutor noted, without contradiction from defense counsel, that he gave the trial court reasons why he excused both Hispanics. In Tabb's new trial motion, defense counsel reported that the trial court, during the sidebar conference, had said that it understood why the prosecutor had excused both the male Hispanic and the female whose country of origin was not known, but not the female Hispanic. However, as defense counsel reported in his written notes, the prosecutor told the trial court he had excused the female Hispanic because she was not paying attention.

[footnote continued on next page]

prosecutor had not excused the two Hispanic prospective jurors for racial reasons. This is all that is required of a trial court. Tabb's assertion that the trial court, during the unreported conference, "evaluate[d] the [prosecutor's] reasons [for excusing the Hispanic prospective jurors]" "only in the abstract. In fact, the [trial] court did not evaluate the reasons as to each individual juror challenged to determine if any one of them was improperly excluded" is based on pure speculation. So too are Tabb's assertions that the trial court, during the unreported hearing, did not make a determination that the female Hispanic's inattentiveness was the real reason the prosecutor excused her, nor did it allow Tabb to dispute this explanation. Considering the fact that the inattentiveness of a potential jury can hardly be gleaned from a cold record, we are amazed that counsel for Tabb here insists that the record does not support this explanation. We agree with Tabb's contention that the excusal of even one prospective juror for racial reasons is improper. However, the trial court's reliance on the fact that Hispanics remained on the jury was not improper. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 735.)

2. *Motions for Mistrial and New Trial*

During his testimony, the officer who arrested Tabb was asked by the prosecutor what Tabb said when the officer approached the Thunderbird. The officer replied, ". . . Tabb informed me that he was on parole." The trial court sustained Tabb's irrelevancy objection and instructed the jury to disregard the testimony. At the close of evidence, the

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[footnote continued from previous page]
At the hearing on the new trial motion, the trial court reiterated its approval of the prosecutor's excusing both Hispanics.

parties stipulated and the trial court instructed the jury that Tabb was not on parole on the day he was stopped by the officer. Having concluded that the stipulation and instruction cured any harm that might have been caused by the officer's stricken testimony, the trial court denied Tabb's motion for a mistrial. Repeating this conclusion, along with its opinion that the evidence of Tabb's guilt was sufficiently strong that it did not believe that the jury convicted Tabb in part because of the reference, the trial court also denied Tabb's later motion for a new trial. Tabb here contests both rulings.

We agree with the trial court on both aspects of its ruling on the latter motion. Tabb fails to persuade us that the outcome of this case could possibly have been any different had the officer not made the statement in the first place. (See *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Harris* (1994) 22 Cal.App.4th 1575, 1581; *People v. Allen* (1978) 77 Cal.App.3d 924, 935; *People v. Stinson* (1963) 214 Cal.App.2d 476, 482.)

3. *Failure to Instruct on Flight of Third Party*

The defense investigator testified that she had a phone number for Tabb's wife's relatives in San Diego, which the wife had left as her contact information. The investigator called the number three times -- twice, she left voice mail messages, and the third time, she left a message with a person who identified herself as the wife's niece. She did not hear from the wife for six or eight weeks. When the wife called the investigator, she did not tell the former where she was. The wife gave the investigator a cell phone number, which turned out to be incorrect. Neither the niece nor "anyone else" told the investigator where the wife was, and the investigator did not know her

whereabouts. The investigator admitted that she had not gone to the couple's home, had not sent anybody there to serve a subpoena, and had not otherwise physically looked for the wife. The phone at the couple's home had been disconnected.

Tabb requested that CALJIC No. 2.52 be given as to the wife, which provides: "The [flight] [attempted flight] [escape] [attempted escape] [from custody] of a person [immediately] after the commission of a crime, or after [he] [she] is accused of a crime, is not sufficient in itself to establish [his] [her] guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide."

Tabb asserted below that this instruction was appropriate because "as soon as . . . Tabb was arrested, [the wife] left. And I think it shows a consciousness of guilt that she has been avoiding being found ever since then." While permitting Tabb to argue the point to the jury, the trial court denied the request, correctly pointing out that no evidence had been introduced as to when Tabb's wife left.[7] The court further noted that the wife had never been charged with the offenses. Tabb here contests the denial of his request.

We agree with the trial court. There was no evidence whatsoever of flight of the wife "immediately after the commission of a crime," which is what the instruction requires. At worst (for her), the evidence created the inference that she was attempting to

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[7] Contrary to the assertion in Tabb's opening brief, there was no evidence that the wife "left town shortly after [Tabb's] arrest in this case."

avoid the defense investigator. The instruction does not address avoidance, but flight. Therefore, it was not supported by the evidence.

4. *Insufficient Evidence*

Tabb contends that there was insufficient evidence that he knew the rear plate on the Thunderbird had been stolen. At the same time, he concedes that convictions for possession of stolen property have been upheld where such property is found in the defendant's possession soon after the theft, citing *People v. Du Bont* (1965) 235 Cal.App.2d 844. He then asserts that, despite this, "'slight' additional corroborating evidence" is necessary. He asserts that such evidence is missing here. He is incorrect. As the prosecutor argued to the jury, from the fact that Tabb received a ticket for an expired annual registration tag[8] in May, which identified his car as having plates bearing the designation "1FIB131," it could reasonably be inferred that he knew that the rear plate that was on his car in June, bearing the designation "4XZP648," was not one of the plates that had been on his car when he bought it in January or drove it in May. The jury could further reasonably infer that Tabb had knowledge that the latter plate had been stolen, as it is common knowledge that license plates do not properly move from one vehicle to another without the intervention of the Department of Motor Vehicles upon application by the vehicle's owner(s). As to Tabb's assertion that it was just as likely that his wife had switched the plate as it was that he had, that is beside the point. It was Tabb,

[8] We note that Tabb was not then cited for having license plates on the car, which did not belong on that car, further giving him notice that the plates then on the car were the proper ones.

not his wife, who was cited in May. Even if Tabb's wife was the one who had actually switched the plate, his receipt of the citation in May created the reasonable inference that he was aware of what plates were properly on the car then. Weeks later, he was caught driving the car with a different plate on the back. This was sufficient to show that *he* had knowledge that the latter plate had been stolen.

Using the same arguments, Tabb also asserts, as to his remaining conviction, that there was insufficient evidence that he displayed a license plate not issued for the Thunderbird and that he did so with intent to avoid compliance with vehicle registration requirements. For the reasons we rejected these arguments above, we reject them in relation to this conviction also. Additionally, we note that Tabb failed to comply with his written promise to take the car out of state, where a smog certificate and current registration were not required. He also failed to honor his written promise on January 20th to have title transferred to him within 10 days, as, in May, the car was still registered in the name of the person who had donated it in January.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

GAUT
J.

KING
J.